



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under The Tenancy Deposit Schemes (Scotland) Regulations 2011**

**Chamber Ref: FTS/HPC/PR/21/1855**

**Re: Property at Berrieswalls Farm, Plains, Airdrie, ML6 8NR (“the Property”)**

**Parties:**

**Ms Kellyann Stevenson, Berrieswalls Farm, Plains, Airdrie, ML6 8NR (“the Applicant”)**

**D & L Properties, Rannoch House, Plains, Airdrie, ML6 8NR (“the Respondent”)**

**Tribunal Members:**

**Richard Mill (Legal Member) and Ahsan Khan (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the respondent requires to pay the applicant the sum of Two Thousand Four Hundred Pounds (£2,400)**

Introduction

1. This is an application under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 and Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Procedure

2. An initial Case Management Discussion (CMD) took place on 11 November 2021 requiring clarification from both parties in respect of a number of matters. The parties’ positions were noted and the case was adjourned to a full evidential hearing. A basic Direction was thereafter issued requiring each party to provide a list of witnesses and a list of documents upon which they were to rely.

3. The application was further case managed following allocation of the application to Tribunal members for the full hearing, first assigned for 12 January 2022.

A Direction was issued dated 1 December 2021 requiring both parties to provide clarification in respect of a number of issues.

4. The full hearing on 11 January 2022 was adjourned on the day due to late evidence being submitted by the respondent. A Direction was issued to regulate further procedure. It was made clear that there would not be an endless opportunity for parties to respond to one another's submissions and productions. Further Directions were necessary due to the attempt by both parties to introduce additional documentation which the Tribunal determined was unnecessary.

#### Documentation submitted into evidence

5. The application to the Tribunal was accompanied by a copy of the lease between the parties. Written representations in response to the application were submitted, together with an inventory of productions with items listed 1 and 2 being an additional copy lease and copy bank statements. These were lodged in advance of the CMD.

6. The applicant relies upon a further bundle of evidence submitted by email on 22 December 2021. This consists of further representations, photographs, copy emails and copy messages, and part of a title plan issued by the Land Register for Scotland.

7. The respondent relies upon a further bundle of evidence submitted by email on 22 December 2021 providing supplementary written submissions, a list of witnesses for the respondent and a second inventory of productions with items listed 1 to 10.

8. The respondent submitted a third inventory of productions the day before the aborted full hearing on 12 January 2022. This was responded to by the applicant who provided further documentary evidence in response together with Minutes of the charity which she is trustee of, as requested by the Tribunal. These additional documents for the applicant were sent to the Tribunal on 28 January 2022 and 8 February 2022.

#### The Hearing

9. The hearing took place by teleconference at 10.00 am on 8 March 2022.

10. The applicant joined personally and was represented and supported by Mr Feroz Molla, a lay representative. The respondent also joined personally and she was represented by Mr Forrester-Smith of Messrs Turcan Connell, Solicitors. Her husband Mr David Douthwaite was present to support her.

11. The Tribunal applied Rule 2 being the overriding objective to ensure that the parties were on an equal footing procedurally. The Tribunal accordingly used its inquisitorial function specifically bearing in mind that the applicant was not legally represented. The Tribunal asked initial questions of the applicant. The respondent's

representative was thereafter afforded an opportunity to cross-examine her. The Tribunal thereafter questioned the respondent. Mr Molla, the applicant's lay representative asked some additional questions of her and thereafter her own representative asked follow on questions. The Tribunal asked additional questions throughout as they saw fit. Both parties had a fair and full opportunity of presenting their case.

12. Both parties were then afforded an opportunity of making oral submissions. The Tribunal reserved its decision.

### Findings in Fact

13. The respondent is the heritable proprietor of the land and buildings held under title number LAN78856. The leased subjects form part of that title which is formally described in the Land Register for Scotland as "Stepends Road, Plains, Airdrie, Berrieswalls, Plains, Airdrie ML6 8NS. The relevant title comprises three adjacent properties being Rannoch House, New House and Berrieswalls Farm. Title LAN78856 which comprises, in part, the leased subjects, is excluded and has been removed from title number LAN27953 which itself comprises the farmlands of Berrieswalls Farm. The subjects which are the subject of the relevant lease and previously occupied by the applicant extends to Berrieswalls Farm House and a small area of land surrounding it which is unquantified, but which can be described as garden grounds.

14. The applicant is Ms Kellyann Stevenson. She resided in the property from 20 March 2020 until 7 January 2022. She stayed there with her daughter, now aged 9 years and with her son, who has additional support needs, now aged 16 years. Her son only stayed on a part time basis. The applicant occupied the property as her sole place of residence.

15. The property is registered with North Lanarkshire Council as a residential property. The applicant personally paid domestic council tax (valuation band D) during her occupation of the property. She was also registered on the electoral register at the property.

16. The respondent is Dawn Douthwaite. She operates as a sole trader and is the sole proprietor of D & L Properties which is a commercial letting agent. She has always previously leased the property at Berrieswalls Farm House out as a residential tenancy. She provided the respondent with her residential landlord registration number at around the time of the lease commencing upon request. The respondent resides with her husband, David Douthwaite, in Rannoch House which is situated adjacent to the leased property which the applicant occupied.

17. The applicant is the founder and a trustee of Canine Campus Food Bank and Rescue, a registered charity (SC047945), with its registered office at 2 Hamilton Road, Rutherglen, Glasgow G73 3DG. The charity has entered into a formal commercial lease of these office premises. The charity was founded in 2017 to promote the

advancement of animal welfare through activities such as distributing pet food to local homeless and low income individuals and the rescue and rehoming of animals at risk. The charity has no paid staff and is run by a committee of members/trustees who make collective decisions. They are all volunteers. Part of the charity's work involves the intake of dogs for assessment and rehabilitation which requires the use of kennels. The applicant's former landlord had restrictions on the number of dogs (3) which she could have.

18. The cost of commercially having dogs kennelled could have been a significant item of expenditure. Committee meetings of the charity agreed therefore in principle, to contribute to the applicant's costs in respect of renting a suitable property which could accommodate a greater number of dogs.

19. The committee of the charity never formally agreed to fully support or fund the applicant's residence at the leased property of Berrieswalls Farm House. They collectively had a number of concerns and the property failed the charity's due diligence checks. There were concerns regarding health and safety. The owner had not been identified. As a compromise the committee agreed that the charity would pay, on behalf of the applicant, the deposit and half of the rental costs, in recognition of the applicant's low income and having regard to the substantially greater costs of commercially kennelling the dogs which they had in their care. A further change in decision was reached by the committee following an accident sustained by the applicant in the last week of February 2020 for which she was hospitalised and required surgery. It was agreed by the charity to pay the applicant's full rent for a period of time before returning to pay half the rental payments. At no time did the charity agree to enter into any lease arrangement with the respondent.

20. In advance of the applicant taking up occupation of the property, she signed two written leases with the respondent. These are both 'residential' type leases. This was at the request of the respondent who produced the leases. There was no negotiation as to their terms. The written leases were both titled "Unfurnished Tenancy Agreement". The written leases purported to be a short assured tenancy under the provisions of the Housing (Scotland) Act 1988. The entering into of such a lease was not competent. Such leases have not been valid in Scotland since 1 December 2017. Rent was stipulated at a rate of £1,200 per calendar month with the requirement to pay a deposit of £2,400.

21. The two written leases name the tenant in alternate forms. The first names the tenant as "Canine Campus Pet Rescue and Foodbank". The second names the tenant as 'Kellyann Stevenson'. They are both dated 19 February 2020.

22. The deposit of £2,400 and proportions of the subsequent rental payments were transferred from Canine Campus Food Bank and Rescue to the respondent. The respondent was aware that these payments were being made on behalf of the applicant.

23. On 3 August 2021 the property was inspected by Mr Douglas McCulloch, Environmental Health Department of North Lanarkshire Council due to the applicant's complaints regarding aspects of the property. He deemed the applicant's occupation of the property to be a private residential tenancy.

24. The respondent adhered to the responsibilities of a residential landlord and subsequently made provision for the detection of smoke and carbon monoxide in the property.

#### Findings in Law

25. The lease arrangement between the parties is a private residential tenancy for the purposes of the Private Housing (Tenancies) (Scotland) Act 2016.

26. The respondent breached her duties in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

#### Reasons

27. The Tribunal was satisfied that it had sufficient detailed evidence upon which to reach a fair determination of the application.

28. The Tribunal's decision is based upon the Tribunal's detailed findings in fact which were established on the basis of the documentary evidence together with clarifications in the oral submissions from the parties representatives. The primary facts were not the subject of dispute. Credibility was not a material factor.

29. The Tribunal has considered all the evidence and submissions and made findings in fact in relation to the relevant live disputes between the parties. It is not necessary to make findings in facts in relation to every element of the application. The failure to make more extensive findings in fact does not carry with it any assumption that the Tribunal has failed to consider the whole evidence or that the Tribunal's reasoning was based upon a consideration of only parts of the evidence.

30. The Tribunal is satisfied that the lease entered into between the parties, was not of a commercial nature. None of the hallmarks or characteristics typically seen in the context of a formal lease agreement are present. For example, there has not been an exchange of Missives in the negotiation of a commercial contract. No Land and Buildings Transaction Tax (LBTT) has been paid to Revenue Scotland. There are no obligations placed upon the applicant in terms of the lease agreement to, for example, be responsible for the insuring and repairing of the property.

31. The two written lease agreements between the parties were produced by the respondent and make specific reference to the Housing (Scotland) Act 1988. This did not apply to commercial leases and the 1988 Act applied only to residential tenancies. The respondent is an experienced residential letting agent. The Tribunal had no hesitation in coming to the conclusion that the respondent's intention was to let the

property to the applicant as her principal home. As a matter of fact the applicant occupied the property as her sole and principal home from 20 March 2020. It is furthermore noted that the attempt of the respondent to enter into a short assured tenancy agreement was not legal. Such tenancies have not operated since 1 December 2017. At least one former tenancy has been created by the respondent in respect of the same let property which was a residential tenancy.

32. The fact that the respondent offered, from the outset, a second written lease naming the applicant personally as the tenant reflects the reality of the situation and the contract between the parties.

33. The Tribunal is satisfied that the respondent knew well that the applicant was primarily to occupy the property as an individual. The applicant and her school age daughter were residing in a domestic arrangement, well known to the respondent who resides next door. It is clear to the Tribunal that the parties had a close working relationship throughout the early part of the tenancy being in operation. The Tribunal rejected the suggestion made by the respondent to the effect that she believed that the facts and circumstances amounted to a commercial tenancy being in operation. There was perhaps a lack of clarity regarding each of the parties understanding as to the arrangements, and it appears to have suited them both at the time, but it is the facts which determine the nature of the tenancy.

34. The Environmental Health Officer who attended the property and inspected it in early August 2021, considered that the facts surrounding the applicant and her family's occupation of the property amounted to it being a private rented property.

35. The applicant has paid domestic council tax to North Lanarkshire Council throughout her entire occupation of the property. Domestic council tax is not paid in respect of commercial properties.

36. The Tribunal notes that in terms of a planning application, referenced C/02/00777/005, made to North Lanarkshire Council, reference is made to the property which is the subject of these proceedings and makes specific reference to it being a "residential unit". The let property is on Green Belt land. No approval for the development of any of the land for the charity was considered or obtained.

37. The fact that the deposit and rental payments have been paid by a source other than by the applicant herself is irrelevant. The fact that A pays the deposit and rental payments of B's lease does not make A the tenant. Alternatively, many parties to residential leases are not individuals. The most common seen are the many landlords who are commercial entities, such as the respondent in this case. This does not make the residential leases created commercial in nature. Similarly there are many tenants who are commercial organisations who contract to rent residential properties for their employees, sometimes as part of a relocation package. This does not negate the fact that such leases are residential in nature. The written leases given their terms are not

valid legal documents. Even if a valid lease had named the tenant as the charity, this of itself, would not make the tenancy agreement a commercial one.

38. It is the factual arrangements which must be looked at for the purposes of the Private Housing (Tenancies) (Scotland) Act 2016. The tenancy is not one of the excepted tenancies as defined within Schedule 1 of the 2016 Act, which cannot be a residential tenancy. As a matter of fact, Berrieswalls Farm House was let by the respondent, Kellyann Stevenson, as an individual. The respondent was well aware of this. She was living next door and knew that the applicant was residing there with at least one of her children on a permanent basis. There are cooking and bathing facilities there and no commercial activities are evidenced to have been undertaken there. The tenancy agreement between the parties is a tenancy as defined by section 1 of the 2016 Act. It was a 'private residential tenancy' regulated by the 2016 Act.

39. The Tribunal was satisfied that an ancillary agreement reached between the parties regarding the use of some of the land and surrounding buildings did not form part of the residential tenancy arrangement in place between the parties for Berrieswalls Farm House itself. The Tribunal noted that the charity paid the sum of £3,600 in respect of drainage works in the vicinity of the let property for the purposes of establishing some kennelling there. The Tribunal was satisfied from the screenshot evidence exchanging between the parties that this was an ancillary and separate agreement beyond the terms of the residential tenancy agreement in operation for the let property which the applicant occupied as her principal home.

40. The Charity approved the payment, or part payment, of the applicant's rent from time to time. The relevant Minutes of meetings of the charity have been produced. It is clear that the charity was not approving the entering into of a lease between itself and the respondent at any time. In fact, on the contrary, the minutes of the charity show the committee has reservations about the applicant letting the property. Any charity work undertaken by the applicant at the property was ancillary to her occupation there as a personal individual.

41. The Tribunal was satisfied that the respondent has not complied with the requirements of the 2011 Regulations and in particular did not lodge the deposit paid to her in the sum of £2,400 to an approved scheme timeously. The duties of landlords are contained within Regulation 3. This requires the landlord who has received the tenancy deposit in connection with the relevant tenancy to pay the deposit to a relevant scheme administrator from an approved scheme within 30 working days of the beginning of the tenancy. The respondent failed to do this.

42. The Tribunal was therefore satisfied that the respondent failed to comply with the duty in Regulation 3. Regulation 10 requires the Tribunal to make an Order against the respondent to pay to the applicant an amount not exceeding three times the amount of the tenancy deposit.

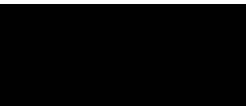
43. The Tribunal considered all relevant circumstances prior to making any Order under Regulation 10. The respondent is operating as a commercial residential letting agent. The Regulations set down a regime with strict liability. The public require to have confidence that residential landlords and their agents are operating fairly and that their deposits are secured in accordance with the law in force in Scotland.

44. The Tribunal orders that the respondent pay to the applicant the sum of £2,400 representing one times the amount of the tenancy deposit in the sum of £2,400. This is fair and proportionate in all of the circumstances of this case. The deposit in this case is a relatively substantial one. The applicant as an individual has suffered no loss, other than inconvenience, because she did not personally pay the deposit. It was clear to the Tribunal that both parties approached the entering into of the rental agreement in a less than professional manner as this appears to have suited them both at the time. Regrettably relations have turned sour.

45. The applicant has brought these proceedings personally in her own name. The Tribunal has found that the charity, of which she is a trustee, paid the deposit on her behalf. The applicant has title and interest to bring these proceedings. It would not however be equitable for the applicant to benefit personally from an Order imposed upon the respondent to make payment under the Regulations. The Tribunal does not doubt that the applicant would transfer over to the charity any sums required by the Tribunal in this legal process. Nonetheless the Tribunal records that it would expect that the respondent will pay the sum ordered directly to the charity for the purposes of expediency. The Tribunal noted in the course of these proceedings that the respondent has retained the initial deposit paid by the charity in the sum of £2,400 and that matter still requires to be remedied. The Tribunal would encourage all relevant parties to resolve the issue of the return of that deposit in early course.

### **Right of Appeal**

**In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**



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**Legal Member/Chair**

\_\_\_\_\_  
**Date**